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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-61

DORTHA LEIGH, Widow and Surviving
Joint Tenant of J. W. Leigh,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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September, 1977

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TABLE OF CONTENTS

	PAGE
I. The State Statute Involved and the Proceedings Below	2
A. The Statute	2
B. The Proceedings Below	2
II. Argument	4
A. The Case Presents No Substantial Federal Question Necessary to Support Jurisdiction	4
B. The Judgment Rests on an Adequate Non-Federal Basis	5
C. The Case Is Not Important	7
D. The Decision Below Is So Obviously Correct as to Warrant No Further Review	7
Conclusion	8

Certificate of Service follows Brief.

TABLE OF AUTHORITIES

CASES:

Allee v. Medrano, 416 U.S. 802	7
Baker v. Carr, 369 U.S. 186	4
Berea College v. Commonwealth of Kentucky, 211 U.S. 45	6
Expert Electric, Inc. v. Levine, 399 F.Supp. 893	4
Mackay Telegraph & Cable Co. v. City of Little Rock, 250 U.S. 94	4
Rogers v. Alabama, 192 U.S. 226	6

AUTHORITIES CONTINUED — PAGE

Standard Surety and Casualty Co. v. State of Oklahoma, 145 F.2d 605 (1944) 8
State Tax Commission of Utah v. Van Cott, 306 U.S. 511 6
State v. Sivin, 225 A.2d 846 6

STATUTES:

68 O.S. Supp. 1973, Sec. 807(A)(4) 2
68 O.S. Supp. 1975, Sec. 807(B)(1) 7
74 Okl. § 18 7

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Oklahoma on the grounds that the case does not present a substantial federal question; that the judgment rests on an adequate non-federal basis; that the case is not important; and that the decision below is so obviously correct as to warrant no further review.

I.

THE STATE STATUTE INVOLVED AND THE PROCEEDINGS BELOW

A. The Statute

This appeal raises the question of the validity of the application, administration and enforcement of Title 68 O.S. Supp. 1973, Section 807(A)(4). This statute provides that the gross estate of the decedent includes any property owned by the decedent and any other person as joint tenants. It further provides that a surviving spouse or joint tenant claiming to own an interest with the decedent in any property included in the taxable estate of the decedent must support said claim by adequate proof, showing the value of claimant's interest contributed in money or money's worth from separate funds or properties. Also, the surviving spouse or joint tenant must provide a sworn affidavit setting forth the facts supporting the claim. The statute provides that this affidavit is considered prima facie evidence of adequate proof.

B. The Proceedings Below

Appellant, the widow and surviving joint tenant, filed an Oklahoma Estate Tax Return as executrix of her husband, J. W. Leigh's estate. The bulk of the estate was a 160-acre tract of land that was held in joint tenancy by the husband and wife. A sworn affidavit was attached to the return setting forth the history of Appellant's marriage to the deceased. The affidavit described all of the wife's duties during the marriage. Appellant claimed contribution in money or money's worth from separate funds or properties

of one-half (½) the value of the estate. Appellant submitted the affidavit as proof.

The Oklahoma Tax Commission denied the exclusion of one-half the value of the property as a contribution from the surviving spouse. Appellant was allowed an exclusion from the estate as her contribution equal to the amount of earnings acquired separately.

The Tax Commission issued an order assessing a tax based on the value of estate less the separate earnings the wife contributed. Appellant protested the assessment. The Commission denied Appellant's claimed contribution. Appellant paid the assessment under protest and filed an appeal to the Supreme Court of the State of Oklahoma. Appellant contended that her sworn affidavit was adequate proof of her contribution of one-half (½); that the Oklahoma Tax Commission discriminated against the Appellant on the basis of sex by requiring proof of her contribution and not requiring proof by husband; that proof of the policy of the Tax Commission is evidenced by the Attorney General's Opinion (Appendix E to Appellant's "Statement as to Jurisdiction"); that by the order issued in this case, the Oklahoma Tax Commission continued to adhere to its policy of presuming that when the husband died, all jointly owned property was to be included in his estate, but that when the wife died, there was not any such presumption; and that the order violated her constitutional rights and deprived her of the money paid under protest without due process of law. The Supreme Court of Oklahoma affirmed the Oklahoma Tax Commission's order (Appendix C to Appellant's "Statement as to Jurisdiction").

II.

ARGUMENT

A. The Case Presents No Substantial Federal Question Necessary to Support Jurisdiction

Not every case arising under federal law is within federal question jurisdiction. The federal claim must be a "substantial" one. *Baker* v. *Carr*, 369 U.S. 186. The right of substantiality refers to whether there is any legal substance to the position plaintiff is presenting, *Expert Electric, Inc.* v. *Levine*, 399 F.Supp. 893. Appellant has alleged the discriminatory enforcement of the questioned statute denies her equal protection of the law. Facts supporting different treatment of persons of the same class under like or similar conditions were not submitted into evidence. Even so, it is not enough to show that a law has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination, *Mackay Telegraph & Cable Co.* v. *City of Little Rock*, 250 U.S. 94. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity, *Mackay Telegraph & Cable Co.* v. *City of Little Rock*, 250 U.S. 94. Appellant offered an Attorney General's opinion to support her presumption of Appellee's policy in administering the statute. The opinion only requires the Oklahoma Tax Commission to consider that contribution of money's worth may be established by a spouse working in a family business or farm operation. Appellee considered Appellant's affidavit and found it insufficient to establish the contribution. Appellant has not

shown an intentional violation of the essential principle of practical uniformity sufficient to constitute discriminatory application, and no substantial federal question exists.

B. The Judgment Rests on an Adequate Non-Federal Basis

The questioned statute levies a tax on the gross estate of a decedent and includes within that gross estate any property held by a person in joint tenancy with another where the surviving joint tenant is unable to show contribution in money or money's worth from separate funds or properties. This statute required *any* surviving spouse to show a contribution, ascertainable in monetary figures, of separate property or funds used in the purchase of the joint tenancy property.

The Estate & Gift Tax Division of the Oklahoma Tax Commission has required more than a mere allegation that contribution was furnished by the surviving spouse. It inquired into the source and origin of the contribution. The surviving spouse was credited only with that portion of the contribution she furnished which was shown not to be attributable to money or money's worth acquired by her from the decedent. Appellant offered a sworn affidavit (Appendix F to Appellant's "Statement as to Jurisdiction"), outlining the history of her marriage to decedent, as evidence of her contribution in money's worth from separate funds.

The statute in question further provides that a sworn affidavit setting forth the facts supporting a contribution claim shall be considered prima facie evidence of adequate proof. "Prima facie evidence" means evidence which, if

credited, is sufficient to establish the fact or facts which it is adduced to prove, *State* v. *Sivin*, 225 A.2d 846.

The Supreme Court of the State of Oklahoma, affirming the order of the Oklahoma Tax Commission, stated that it agreed to the facts contained in the affidavit, but the facts contained in the affidavit, other than those reflecting the survivor's contribution of money, do not meet the conditions for exclusion from the estate part of the joint tenancy. Thus, this Court based its decision on the inadequacy of the affidavit and not upon any constitutional issues.

Where the decision of the state court is deemed to rest upon a non-federal ground which independently and adequately supports the state court judgment, the Supreme Court will not exercise jurisdiction to review, notwithstanding the raising of federal questions upon the state court record or the decision of the questions by the state court, *Berea College* v. *Commonwealth of Kentucky*, 211 U.S. 45. If the state court judgment is based upon a non-federal ground, it becomes necessary to inquire whether that ground is "adequate" to support the judgment without consideration of the federal question. In order to defeat review, the non-federal ground must be "sufficiently broad to maintain the judgment" without reference to the federal question, and must not be "so intermingled with that of federal right that the former cannot be considered as an independent matter." *State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511. Further the non-federal ground must be shown to be tenable, *Rogers* v. *Alabama*, 192 U.S. 226. A tenable ground must have substantial support. The state court decision was based on the inadequacy of the affidavit

as support for the contribution and can be considered an independent matter. Thus, the judgment rests on an adequate non-federal basis.

C. The Case Is Not Important

The statute in question was repealed by the First Regular Session of the 35th Legislature, 1975, codified as Title 68 O.S. Supp. 1975, Section 807(B)(1). The new law makes joint property passing between spouses exempt from Oklahoma estate tax, regardless of whether the surviving spouse made a contribution to its acquisition. Passage of this new statute satisfies all the principles contended for by Appellant.

In such circumstances, the attack on the prior statute is moot. *Allee* v. *Medrano*, 416 U.S. 802. The new statute cures any allegation of discriminatory administration and this case is not sufficiently important to warrant federal jurisdiction.

D. The Decision Below Is So Obviously Correct as to Warrant No Further Review

There is no question as to the validity of the statute. The only question relates to the administration of the statute. The only evidence submitted in support of Appellant's allegation of discriminatory application was the Attorney General's opinion (Appendix E to Appellant's "Statement as to Jurisdiction"). One of the duties of the Attorney General is to render advisory opinions to state officials, 74 Okl. § 18. It is the duty of public officials to follow the advice of the Attorney General when well-founded doubt or un-

certainty exists concerning the construction to be placed upon a statute. *Standard Surety and Casualty Co.* v. *State of Oklahoma*, 145 F.2d 605 (1944).

Evidence was not submitted showing a policy of the Tax Commission contrary to the Attorney General's opinion. The opinion was an advisory one and cannot be substituted as evidence of the fact that the Oklahoma Tax Commission was administering the statute in a discriminatory manner.

The decision of the Supreme Court of the State of Oklahoma was based upon the requirements of the affidavit. Since evidence supporting Appellant's discrimination argument was not submitted, the Court had no choice but to decide the issue of allowing or not allowing the contribution of the spouse on the adequacy of Appellant's affidavit.

The decision of the Supreme Court of the State of Oklahoma is correct and doesn't warrant further review.

CONCLUSION

Wherefore, Appellee respectfully submits that the case presents no substantial federal question necessary to support jurisdiction; that the judgment rests on an adequate non-federal basis; that the case is not important; and that the decision is so obviously correct as to warrant no further review, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judg-

ment entered in the cause by the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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September, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 1977, three copies of Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Mr. Clee Fitzgerald, Fitzgerald, Houston & Worthington, P. O. Box 2, Stillwater, Oklahoma 74074, Attorneys for the Appellant. I further certify that all parties required to be served have been served.

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